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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

9 || VICTOR D. HOLMES,

Petitioner,

11 | VS.

12 || GREG SMITH, et al.,

13 || Respondents.

Case No. 3:09-cv-00337-LRH-(RAM)

## ORDER

The Court dismissed this action because it was untimely. Order (#5). Petitioner has submitted a Notice of Appeal (#9) and a Request for Certificate of Appealability on Dismissal (#7).

To appeal the denial of a petition for a writ of habeas corpus, Petitioner must obtain a certificate of appealability, after making a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c).

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

27     Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074, 1077-79 (9th  
28 Cir. 2000).

1 Petitioner claims that he did not receive anything from the Court from after he mailed his  
2 Petition (#4) until he received notification that the action had been dismissed as untimely. Even if  
3 true, in the Request (#7) Petitioner does not show cause why the action should not be dismissed as  
4 untimely, and he does not present any appealable issues. Petitioner argues that counsel should have  
5 been present each time he was re-sentenced, and that he was sentenced in absentia. That argument  
6 does not explain why Petitioner took more than the allowable time to file his Petition (#4) in this  
7 Court. Reasonable jurists would not disagree with the Court's conclusion.

8 IT IS THEREFORE ORDERED that Petitioner's Request for Certificate of Appealability on  
9 Dismissal (#7) is **DENIED**.

10 DATED this 12<sup>th</sup> day of November, 2009.



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13 LARRY R. HICKS  
14 UNITED STATES DISTRICT JUDGE  
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